STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1903

State of Minnesota,
Respondent,

vs.

Bruce J. Johnson,
Appellant.

Filed December 16, 2008
Affirmed
Minge, Judge

McLeod County District Court
File No. CR-06-924

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Michael Junge, McLeod County Attorney, 830 East Eleventh Street, Suite 112, Glenco, MN 55336 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Jodie L. Carlson, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Connolly, Presiding Judge; Minge, Judge; and Crippen, Judge.[*]

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

MINGE, Judge

Appellant challenges his conviction of first-degree controlled substance crime, arguing that the district court erred in refusing to exclude evidence obtained as a result of a search of his garbage and of a subsequent search of his house. Appellant also challenges the district court's denial of his motion for a downward dispositional departure in sentencing. Because we conclude that the district court did not err or abuse its discretion in deciding that (1) the garbage searched was in an area where appellant did not have a reasonable expectation of privacy; (2) the search warrant authorizing the unannounced search of appellant's home was supported by probable cause; and (3) it would not depart from the sentencing guidelines, we affirm.

FACTS

In the fall of 2006, officer Shelby Franklin obtained information that appellant Bruce J. Johnson was engaged in drug dealing from two confidential reliable informants, one of whom made a controlled purchase of a substance containing amphetamine from appellant. Officer Franklin went to appellant's home in Hutchinson and observed garbage containers placed for pickup adjacent to the street. The containers were partially on the curb and partially on the end of the driveway. Officer Franklin removed garbage from one of the containers and searched it at the police department. That search revealed two empty Zig Zig rolling paper containers, plastic baggies and corners of plastic baggies, evidence of drug use, green stems, green leaves, and a nickel-sized green, leafy substance, which later tested positive for THC.

Officer Franklin applied for a warrant to search appellant's residence on the same day as the garbage search. His affidavit in support of the warrant referenced the items seized in the garbage search, recounted their use in consuming and selling prohibited controlled substances, and summarized information from two informants including appellant's threats to use a gun on anyone who disrupted his business. Based on the application, a "no-knock" search warrant was issued for appellant's residence. Hutchinson police officers and several BCA agents executed the warrant. During the search, appellant was found carrying $9,832 in cash. Police also found three large baggies containing 128 grams of marijuana and two baggies containing 27.7 grams of methamphetamine in his living room.

Appellant later admitted that the drugs were his and that he sold marijuana and a little bit of methamphetamine. Appellant waived his right to a jury trial and had a stipulated-facts trial pursuant to *State v. Lothenbach*, 296 N.W.2d 854 (Minn. 1980), which preserved his right to maintain this appeal. Appellant was convicted of first-degree controlled substance crime, possession of methamphetamine, under Minn. Stat. § 152.021, subd. 2(1) (2006) and fifth-degree controlled substance crime, possession of marijuana, under Minn. Stat. § 152.025, subd. 2(1) (2006). Appellant moved for a downward dispositional departure. The district court denied the departure request and imposed an 81-month sentence for the first-degree offense. No sentence was imposed for the fifth-degree offense. This appeal follows.

D E C I S I O N

I.

The first issue is whether the police search of appellant's garbage container was illegal. "When reviewing pretrial orders on motions to suppress evidence, we may independently review the facts and determine, as a matter of law, whether the district court erred in suppressing—or not suppressing—the evidence." *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999).

The Fourth Amendment protects people, not places. *Katz v. United States*, 389 U.S. 347, 351, 88 S. Ct. 507, 511 (1967). Accordingly, a defendant may only invoke its protections if he or she had a reasonable expectation of privacy in the place searched. *Minnesota v. Carter*, 525 U.S. 83, 88, 119 S. Ct. 469, 472 (1998). Under *State v. Oquist*, 327 N.W.2d 587, 591 (Minn. 1992), a person retains some expectation of privacy in garbage placed in cans on his private property. However, there is no expectation of privacy in garbage that has been set on the curb or in the street at the end of a residential driveway for collection, and a police officer who searches garbage placed in these areas does not commit an illegal search. *State v. Goebel*, 654 N.W.2d 700, 703-04 (Minn. App. 2002).

The district court found that appellant's "garbage container was at the end of the driveway, on the boulevard. The garbage was essentially at the curb for pick-up." Appellant is asking this court to find that, because the containers sat partially on his driveway, he retained a reasonable expectation of privacy. However, the containers were at the end of his driveway. If they were not in the public right-of-way, they were beyond

the area where appellant had any expectation of privacy. Consequently, we find that appellant did not have a reasonable expectation of privacy in his garbage and that the police search was not illegal.

II.

The second issue is whether the search warrant was supported by probable cause. The United States and Minnesota Constitutions provide that warrants must be supported by probable cause. U.S. Const. Amend. IV; Minn. Const. art I, § 10. Probable cause to search exists when "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *State v. Carter*, 697 N.W.2d 199, 205 (Minn. 2005) (quotation omitted). When reviewing a probable cause determination, we analyze whether the supporting affidavit provides a substantial basis for a finding of probable cause. *State v. Harris*, 589 N.W.2d 782, 787-88 (Minn. 1999); *State v. Zanter*, 535 N.W.2d 624, 633 (Minn. 1995).

In *State v. Papadakis*, 643 N.W.2d 349, 356 (Minn. App. 2002), this court concluded that evidence obtained in a garbage search outside a home "provided an independent and substantial basis for the district court's probable cause determination" to issue a warrant to search a home. Other information in the affidavit supporting the warrant in *Papadakis* included a claim from a confidential informant that a large amount of short-term traffic was occurring at the home and previous police contact with the defendant at that home. *Id.* at 352-53.

Here, Officer Franklin's affidavit recounts several bases for issuing a search warrant. First, there were two confidential informants, compared to just one informant in

Papadakis. Second, the information provided by the informants in appellant's case recounted actual drug sales. In *Papadakis*, the informant only disclosed unusual short-term traffic. Third, there were strong reasons to consider the informants trustworthy because one of the informants had provided the police with information leading to the arrest of numerous individuals and the other informant had performed a controlled buy for Officer Franklin and provided information that Officer Franklin later independently verified and corroborated. Fourth, a controlled purchase of narcotics had been made from appellant. Fifth, and most importantly, the search of appellant's garbage—immediately outside of his residence on the same day of the application for the warrant—disclosed evidence of drug activity at appellant's residence, the place to be searched.

We conclude that, based on the totality of the circumstances, the district court did not abuse its discretion in determining that there was probable cause to issue the warrant to search appellant's home.

III.

The third issue is whether the no-knock authorization in the search warrant was supported by a sufficient factual basis. When the material facts are not in dispute, this court conducts a de novo review to determine whether granting unannounced-entry authority was justifiable. *State v. Botelho*, 638 N.W.2d 770, 777 (Minn. App. 2002). To justify a no-knock entry, "police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." *State v. Wasson*, 615 N.W.2d 316, 320 (Minn.

2000) (quotation omitted); *accord State v. Goodwin*, 686 N.W.2d 40, 43 (Minn. App. 2004), *review denied* (Dec. 14, 2004). The quantum of proof necessary to establish reasonable suspicion does not require an airtight case that knocking and announcing would be dangerous or would inhibit effective investigation. *Wasson*, 615 N.W.2d at 322. Rather, it requires something "more than an unarticulated hunch" but less than an "objectively reasonable belief." *Id.* at 320-21.

In *Wasson*, the court held that there was reasonable suspicion for a no-knock entry where the supporting affidavit listed ongoing drug sales at the home and that, three months before the search, numerous weapons were seized from the home. *Id.* The police only suspected the presence of weapons because weapons had been seized from the home three months earlier; they did not know whether other weapons were in the home. *Id.* Nonetheless, the court found the information in the affidavit presented "more than an unarticulated hunch and objectively support[ed] a reasonable suspicion that knocking and announcing police presence would be dangerous" and held that the affidavit presented facts that justified the no-knock entry. *Id.* at 321-22.

Here, in the probable cause portion of the warrant application, Officer Franklin wrote:

> CRI#1 also stated that they heard Johnson threaten a buyer of controlled substances that he would "pull a gun" on anyone who "messes" with him. CRI#1 stated Johnson stated, "I don't give a f--k, I got money in the bank! I'll pull a gun on any mother----r who messes with me!"

Officer Franklin also wrote, "CRI#2 stated they have also heard Johnson threaten customers that he would use a gun if they were to disrupt his business. CRI#2 never witnessed Johnson display a gun."

Officer Franklin had a reasonable basis for suspecting danger to officer safety based on the statements by the confidential informants and the apparent volume of drugs and drug sales that were taking place in appellant's residence. In regard to appellant's threats about using guns, appellant argues that there is no information to show that his threats were more than "merely idle braggadocio." We disagree. The presence of firearms in drug trafficking is a serious problem. Law enforcement officers are not obliged to expose themselves to actual use of firearms by drug dealers before being given authority to effect a no-knock entry. Here, the affidavit in support of the search warrant recounted multiple reports that appellant threatened gun violence to protect his drug business. We conclude that the affidavit established a reasonable suspicion that execution of the search warrant would expose law enforcement officers to the risk of violence and that the affidavit presented facts that justified the no-knock entry.

IV.

The fourth issue is whether the district court abused its discretion in refusing to dispositionally depart from the presumptive 86-month executed prison sentence. The presumptive sentence is mandatory unless the case involves "substantial and compelling circumstances" to warrant a downward departure. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981); *State v. Anderson*, 463 N.W.2d 551, 555 (Minn. App. 1990) (applying abuse-of-discretion standard in evaluating downward departure), *review denied* (Minn.

Jan. 14, 1991). Only in a "rare" case will a reviewing court reverse a district court's imposition of the presumptive sentence. *Kindem*, 313 N.W.2d at 7.

At sentencing, appellant had no criminal history points, and his conviction had a severity level of nine. Minn. Sent. Guidelines V. The presumptive sentencing range was incarceration for 74 to 103 months. Minn. Sent. Guidelines IV. The presentence investigation (PSI) recommended incarceration "for a period not to exceed 98 months." The state argued against the downward dispositional or durational departure, highlighting: (1) the copious drugs and money; (2) a statement that appellant made purporting to be the mastermind behind the drug dealing at his home; and (3) that while unemployed, appellant was driving around in an expensive Cadillac and purchased a home. The evidence suggested that appellant was involved in "significant drug activity." The state also emphasized that the PSI indicated that appellant was remorseless and unamenable to probation.

Appellant argued that his youth, remorse, and amenability to treatment in a probationary setting justified a lengthy probation sentence in lieu of prison. He argued that he was not a drug dealer, had ceased associating with people connected with drug dealing, and wanted to be an active father in the life of his young child.

After reviewing the PSI, reviewing appellant's probation violation reports, and listening to both parties' arguments, the district court refused to order a downward departure and instead ordered an 81-month sentence. In its order, the district court noted that part of its rationale was that the quantity of drugs indicated that appellant was a dealer. We conclude that the district court did not abuse its broad discretion in

determining that appellant had not presented "substantial and compelling circumstances" requiring a downward dispositional departure.

Affirmed.

Dated: